Supreme Court, U.S.
FILED
JUN 2 2000
CLERK

No. 99-859

In the
Supreme Court of the United States

CENTRAL GREEN CO.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can the United States benefit from flood control immunity for damage caused by waters held and released only for irrigation purposes?

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INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae.[1] Written permission to file this brief has been obtained from all parties and has been lodged with the Clerk of the Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska. PLF has a long history of advocacy before this Court and has participated in numerous cases involving the interpretation of federal laws. For example, PLF was amicus curiae in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995); and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

PLF seeks to augment the arguments of Petitioner by addressing the interaction between the immunity provision of the Flood Control Act and the broad waiver of immunity embodied in the Federal Tort Claims Act. PLF believes its public policy perspective and litigation experience will provide

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

an additional and necessary viewpoint on the legal issues presented.

STATEMENT OF THE CASE

The Central Green Company owns 1,000 acres of pistachio orchards in Madera County, California. The Madera Canal is a federal water management project that runs through Central Green's property, conveying irrigation water throughout the San Joaquin Valley. Leaks in the canal have damaged Central Green's orchard. The United States owns the Madera Canal but has entered into an agreement giving the Madera Irrigation District and the Chowchilla Water District authority to operate and maintain the canal. Central Green sued the United States and the Madera Irrigation District under the Federal Tort Claims Act, alleging that negligent planning, design, construction, or maintenance led to the leaks that caused surface and subsurface damage to Central Green's property.

The United States responded by claiming immunity under section 702c of the Flood Control Act, which prevents suits "for any damage from or by floods or flood waters at any place." Although flood control is not one of the stated purposes of the Madera Canal, the Madera Canal is part of the Central Valley Project, which has flood control as one of its congressionally authorized purposes. The district court and the Ninth Circuit ruled that, because the Madera Canal is part of a project that Congress authorized for flood control purposes, section 702c immunizes the United States from suit, even though the Madera Canal itself is not used for flood control, and the leaks at issue here were not caused by flood conditions.

SUMMARY OF ARGUMENT

In the case at bar, the Central Green Company seeks compensation from the United States for damage caused by the government's negligent acts. Thus, this claim would fall within the scope of the Federal Tort Claims Act, which contains a

broad waiver of sovereign immunity for tort claims against the United States. However, it is established law that when Congress enacted the Federal Tort Claims Act, it did not intend to repeal the immunity provision of the Flood Control Act, which prohibits government liability for damage caused "from or by floods or flood waters." Consequently, flood control immunity persists as an exception to the waiver of immunity in the Federal Tort Claims Act.

Although flood control immunity has not been repealed, this Court has stated that "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *Food and Drug Administration v. Brown & Williamson Tobacco Co.*, 120 S. Ct. 1291, 1306 (2000) (internal citation omitted). Since the Federal Tort Claims Act was enacted after the Flood Control Act, its sweeping statement of policy in favor of United States liability for its own torts should "shape or focus" the meaning of the immunity provision of the Flood Control Act.

In order to avoid conflicting with the Federal Tort Claims Act, the immunity provision of the Flood Control Act should be limited to its own terms. Rather than extending to any act that might be remotely related to a federal flood control project, immunity should cover only those federal actions undertaken for the purpose of controlling flooding. Several circuit courts of appeals have so limited the application of the Flood Control Act in light of the purposes of the Federal Tort Claims Act. Restricting the immunity provision to it's express terms is the only way to effectuate the broad purposes of the Federal Tort Claims Act.

ARGUMENT

FLOOD CONTROL IMMUNITY SHOULD BE INTERPRETED NARROWLY IN ORDER TO AVOID CONFLICTING WITH THE BROAD PURPOSES OF THE FEDERAL TORT CLAIMS ACT

A. Exceptions to the Federal Tort Claims Act Are Interpreted Narrowly

The Federal Tort Claims Act is a broad waiver of sovereign immunity that should be interpreted liberally because Congress used such sweeping language. In keeping with this principle, this Court has emphasized, on several occasions, that exceptions to the Federal Tort Claims Act should be interpreted narrowly.

In clear and precise language, the Act declared that federal courts are authorized to "render judgment *on any claim* against the United States, for money only . . . on account of damage to or loss of property," if a private person would be liable for the same wrong.[2] Federal Tort Claims Act, ch. 753, § 410, 60 Stat. 843, 843-44 (1946). This Court has consistently rejected invitations to diminish government liability under the Federal Tort Claims Act, by refusing to burden the act with exceptions.

For example, in *United States v. Yellow Cab*, 340 U.S. 543 (1951), the government claimed that it had not consented to be impleaded as a third-party defendant in an action for contribution due a joint tort-feasor. Since the Federal Tort Claims Act didn't specifically waive sovereign immunity to being impleaded as a third-party defendant, the government claimed, such a waiver did not exist. This Court disagreed, refusing to nit-pick where immunity had been waived in such broad terms:

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[2] Minor changes to the language of the Federal Tort Claims Act were made when Title 28 of the United States Code was recodified. *See Feres v. United States*, 340 U.S. 135, 140 n.9 (1950). On the importance of these changes, this Court has declared: "We attribute to this change of language no substantive change of law." *Id.*

> The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.

United States v. Yellow Cab, 340 U.S. at 554 (quoting Judge Cardozo in *Anderson v. John L. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926)).

Following this pronouncement, this Court has always given the terms of the Federal Tort Claims Act a broad construction. For example, in *Indian Towing Company v. United States*, the Court explained:

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. *Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.*

Indian Towing Company v. United States, 350 U.S. 61, 68-69 (1955) (emphasis added).

Thus, when a given tort falls under the expansive waiver of immunity in the Federal Tort Claims Act, the court should not stretch exceptions to that waiver in an effort to limit liability. Since the broad language of the Federal Tort Claims Act, standing alone, would cover the suit at bar, and waives sovereign immunity in such sweeping language, the immunity preserved in the Flood Control Act should be read narrowly and should be limited to its express terms.

B. The Immunity Provision of the Flood Control Act Should Be Limited to the Plain Meaning of the Text

To avoid conflicting with the expansive purposes of the Federal Tort Claims Act, the immunity provision of the Flood Control Act should be interpreted narrowly. Since both statutes address the potential for governmental liability, each should be interpreted in light of the other. As this Court recently explained,

> [a]t the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani*, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended."

Food and Drug Administration v. Brown & Williamson Tobacco Corp., 120 S. Ct. at 1306 (internal citations omitted).

So it is in the present case. The Federal Tort Claims Act was enacted after the Flood Control Act. Therefore, the specific liability policy embodied in the Federal Tort Claims Act should control this Court's construction of the Flood Control Act.

The immunity provision of the Flood Control Act, codified at 33 U.S.C. § 702c, preserves immunity only "for any

damage from or by floods or flood waters." Yet the determination of whether the immunity provision will apply often turns on whether the damage is related to a flood control *project*, rather than whether the damage is caused by "floods or flood waters." *See, e.g., Williams v. United States*, 957 F.2d 742 (10th Cir. 1992) (denying immunity because water was released from a navigation project, rather than a flood control project); *Schell v. National Flood Insurers Association*, 520 F. Supp. 150, 154 (1981) (denying government immunity because the National Flood Insurance Act "should not be considered a flood control project"); *State of Washington v. East Columbia Basin Irrigation District*, 105 F.3d 517 (9th Cir. 1997) (recognizing governmental immunity because flood control was one of the purposes of the project, even though collapsed retaining wall was for an irrigation channel); *Portis v. Folk Construction Co.*, 694 F.2d 520 (8th Cir. 1982) (recognizing immunity because lake control structure was part of a flood control project, even though the actual purpose of the structure was to benefit hunters and fishermen by furnishing a natural environment for fish and game).

This focus on flood control projects, rather than on flood waters, has led courts to create tests that have tenuous connections to the text of section 702c. For example, as the Seventh Circuit has explained, the "not wholly unrelated" test used in the Ninth Circuit can lead to ridiculous results:

> If the Corps of Engineers should allow a walrus-sized pothole to swallow tourists' cars on the way to the beach, or if a tree-trimmer's car should careen through some picnickers, these injuries would be "associated with" flood control. They would occur within the boundaries of the project, and but for the effort to curtail flooding the injuries would not have happened. Yet they would have nothing to do with management of flood waters, and it is hard

> to conceive that they are "damage from or by floods or flood waters" within the scope of § 702c.

Fryman v. United States, 901 F.2d 79, 81 (7th Cir. 1990).

Under the Flood Control Act, flood control immunity was intended to protect the construction and operation of flood control projects *for the purposes of controlling flooding*. When courts recognize immunity for conduct with only a tenuous connection to the management of flood waters, they frustrate Congress' purpose in making the United States liable for its own torts. The threat of results like those hypothesized in *Fryman* should impel courts to limit the scope of flood control immunity to activities related to controlling floods. Where immunity is extended beyond these purposes, it conflicts with the broad objectives of the Federal Tort Claims Act.

Several courts of appeals have recognized the importance of interpreting the Flood Control Act in light of the Federal Tort Claims Act. For example, in *Graci v. United States*, the Fifth Circuit explained that earlier cases which may have contained "hints of absolute non-liability" by the Government for flood damage, "have now been superseded by the more liberal policy of the Federal Tort Claims Act." 456 F.2d 20, 28 (5th Cir. 1971). In that case, the Fifth Circuit endorsed Judge Heebe's district court analysis of section 702c. *See id.* 456 F.2d at 27. Judge Heebe discussed the history of the immunity provision of the Flood Control Act, quoting from the *National Manufacturing Company* case:

> The cost of the flood control works itself would inevitably be very great and Congress plainly manifested its will that those costs should not have the flood damages that will inevitably recur added to them. Undoubtedly floods which have traditionally been deemed "Acts of God" wreak the greatest property destruction of all natural catastrophes and where floods occur after flood control work has been done and relied on the damages are vastly increased. But there is no question of the power and right of Congress to keep the government entirely free from liability when floods occur, notwithstanding the great government works undertaken to minimize them. [. . .] So that uniformly and throughout the country at any place where there is damage "from" or "by" a flood or flood waters in spite of and notwithstanding federal flood control works no liability of any kind may attach to or rest upon the United States therefor.

Graci v. United States, 301 F. Supp. 947, 952 (E.D. La. 1969) (quoting *National Manufacturing Company v. United States*, 210 F.2d 263, 270-71 (8th Cir. 1954)).

> One could not wish for a more lucid statement of the rationale of the [section 702c] immunity: that an immunity from liability for floodwater damage arising in connection with flood control works was the condition upon which the government decided to enter into the area of nationwide flood control programs. *But there is no reasonable basis to suppose that the government entered into flood control works in exchange for a complete immunity from liability for the negligent and wrongful acts of its employees unconnected with flood control projects.*

Graci v. United States, 301 F. Supp. at 952 (emphasis added). Instead, "[i]nsofar as provisions for federal nonliability for floodwater damage under [section 702c] is totally dissociated from federal involvement in flood control programs, it should be held superseded by the general liberal waiver of immunity of the Federal Tort Claims Act." *Id.* at 954.

To the extent the negligent acts of government employees were not undertaken for the purpose of controlling flood waters, such as in the present case, Judge Heebe, and the Fifth Circuit, would deny immunity because of the broad purposes of the Federal Tort Claims Act.

In the present case, the damage to Petitioner derived from the government's failure to maintain a canal used exclusively for agricultural irrigation, not for controlling flood waters. In fact, as in *Graci*, the Government's negligent acts were totally dissociated from federal involvement in flood control programs. The damage in this case was not caused by flood waters or flood protection activities. Thus, the immunity clause of the Flood Control Act should be held superseded by the general liberal waiver of immunity of the Federal Tort Claims Act as decided by the Fifth Circuit.

The Fifth Circuit is not alone in adopting a narrow interpretation of the Flood Control Act. Both the Fourth and Sixth Circuits also narrow the scope of section 702c immunity in light of the purposes of the Federal Tort Claims Act. In *Hayes v. United States*, the Fourth Circuit explained:

> Since the purpose of [section] 702c was to insulate the federal government's activities in aid of flood control, after enactment of the Federal Tort Claims Act the reach of the [section] 702c immunity has been confined to damage from flooding which allegedly occurred because of the government's antiflooding activity.

585 F.2d 701 (4th Cir. 1978). As the Sixth Circuit more recently explained "focus on the allegedly tortious act is the only way to reconcile the Flood Control Act with the general principles of governmental responsibility embodied in the Federal Tort Claims Act." *Cantrell v. United States*, 89 F.3d 268, 273 (6th Cir. 1996).

CONCLUSION

The Federal Tort Claims Act is an enactment more recent than the Flood Control Act, expressing an expansive intention that the United States should be subject to liability for its own torts. In light of the sweeping language of the Federal Tort Claims Act, which this Court has consistently refused to narrow, the immunity provision of the Flood Control Act should be seen as a minor exception, which is limited to its own terms. Flood control immunity under section 702c should extend only to those acts undertaken for the purposes of controlling flooding. Where, as here, the United States has neglected to maintain irrigation canals, conduct unrelated to any efforts to control flooding, immunity should be denied.

DATED: June, 2000.

Respectfully submitted,

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